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Recommended Citation

Brief of Appellant, *Palmquist v. Palmquist*, No. 8493 (Utah Supreme Court, 1956).

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

APR 2 - 1956

Clerk, Supreme Court, Utah

FERN H. PALMQUIST,
Plaintiff and Appellant

vs.

LOWELL G. PALMQUIST,
Defendant and Respondent

Case No. 8493

APPELLANT'S BRIEF

WHITE, ARNOVITZ & SMITH

Attorneys for Appellant

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IN THE SUPREME COURT
of the
STATE OF UTAH

FERN H. PALMQUIST,
Plaintiff and Appellant

vs.

LOWELL G. PALMQUIST,
Defendant and Respondent

} Case No. 8493

APPELLANT'S BRIEF

STATEMENT OF FACTS

On December 10, 1954 a decree of divorce was entered in this case in favor of the plaintiff and against the defendant. The decree awarded certain household furniture to the plaintiff, ordered the defendant to pay outstanding marital obligations and also awarded the plaintiff the sum of \$1320.00 to be paid by the defendant. The sum of \$600.00 was to be paid immediately and the balance of \$720.00 was to be paid on or before June 1, 1955.

The defendant paid the sum of \$600.00 shortly after the decree was entered and thereafter paid \$400.00 to apply upon the balance of \$720.00 but did not pay the remaining sum of \$320.00.

On November 28, 1955 the plaintiff petitioned the Court below to enter a judgment for the balance of \$320.00 and to order the defendant to show cause why he should not pay the \$320.00 or be held in contempt of Court for refusing to pay the balance of \$320.00. This petition came on for hearing on the 12th day of January, 1956, and at the said hearing it was admitted that the defendant did not pay the said sum of \$320.00. The Court ordered judgment in favor of the plaintiff for the sum of \$320.00 plus interest, costs, and attorneys fees for a total judgment of \$393.10.

The defendant did not file any answer to the petition for an order to show cause but at the hearing he sought to excuse his non-payment of the sum of \$320.00 on the ground that he had a claim for damages against the plaintiff. This alleged claim for damages arose from the fact that after the date of the decree the defendant deposited with the plaintiff title papers to a race horse which were to be held by the plaintiff until the defendant finished paying the amount he was ordered to pay by this judgment. The entire balance was due on or before June 1,

1955. The horse was not to be raced until sometime in September. In the first part of August, 1955, the balance of \$320.00 being outstanding, the defendant demanded the papers from the plaintiff. The plaintiff refused to return them until the \$320.00 was paid. Defendant stated that he tendered the \$320.00 to the plaintiff and the plaintiff stated that no tender was made. This Court made Findings of Fact with respect to that matter as follows:

“That *after* the entry of decree on December 10, 1954, the plaintiff and defendant agreed that when the defendant *finished* paying the plaintiff the aforesaid sum of \$1320.-00 that the said papers were to be delivered by the plaintiff to the defendant; that the defendant paid only the sum of \$1,000.00 to apply on the said sum of \$1320.00; that a dispute exists as to whether the defendant tendered the additional sum of \$320.00 to the plaintiff; that no tender of the said amount of \$320.00 was made at any time prior to the first part of August, 1955; that the defendant required these papers so that he could enter his horse in a race on or about September 1, 1955; that the defendant has never instituted any proceeding in any Court of Law to require the plaintiff to deliver the said papers to him.” (Italics ours.)

STATEMENT OF POINTS TO BE RELIED UPON

1. That the District Court erred in restricting the right of the plaintiff to levy an execution

for the amount of the judgment entered in favor of the plaintiff and against the defendant. The restriction on the plaintiff being that the plaintiff may not issue an execution on the said judgment in the event that the defendant commenced a plenary action against the plaintiff for damages on an alleged cause of action for withholding certain title papers on a horse.

2. That the District Court erred in permitting the introduction in this proceeding of any evidence with respect to an alleged cause of action independent of matters adjudicated in the divorce proceeding and independent of any matter required to be adjudicated in the summary proceeding brought for the enforcement of a judgment already entered.

3. That the Court erred in refusing to permit an execution to issue on a judgment for alimony that had accrued and was unpaid.

ARGUMENT

The three points to be relied upon are somewhat interrelated and therefore the argument relates to the 3 points but for convenience is broken down into three subdivisions.

R. C. P. 62 (a) SETS FORTH THE CIRCUMSTANCES WHEN A COURT IS AUTHORIZED TO STAY EXECUTION ON A JUDGMENT. NONE OF THESE CIRCUMSTANCES ARE PRESENT HERE.

R. C. P. 62 (a) reads:

“Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment unless the Court, in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs.”

The Compiler’s note states:

“This rule had no counterpart in the former Civil Code and invokes a new procedure which allows immediate execution unless the Court for some reason otherwise directs in which event the prevailing party must be protected. Although there was no provision in the former Civil Code pertaining to this matter, it has been the practice to authorize execution on a judgment at once. This Rule differs from Federal Rule 62 (a) which requires an automatic stay for ten days.”

Rule 62 (b) sets forth the circumstances under which a stay of execution may be granted. None of the circumstances are present in this case.

SUBDIVISION 1.

FORMERLY COURTS OF EQUITY UNDER CERTAIN FACTUAL SITUATIONS MIGHT HAVE STAYED EXECUTION OF A JUDGMENT. THOSE FACTS ARE NOT PRESENT HERE AND EVEN IF THEY WERE, THE RULES OF CIVIL PROCEDURE SET FORTH THE ONLY LEGAL SITUATIONS WHICH JUSTIFY A STAY OF EXECUTION.

There are no circumstances in this proceeding which should entitle a judgment debtor to a stay of execution. Courts of Equity were permitted to

restrain a judgment creditor from collecting a judgment against the judgment debtor in order to allow a judgment debtor an opportunity to judicially establish a claim against the judgment creditor. To entitle a judgment debtor to such a restraining order, he was required to show facts which would establish that he would suffer irreparable injury unless a restraining order were issued. The judgment debtor would be required to show that unless the restraining order was issued, he would lose the opportunity to collect a judgment from the judgment creditor because of the fact that the judgment creditor was either insolvent or was a non-resident.

In this case the judgment debtor suggests to the Court that he has a claim for unliquidated damages against the judgment creditor and without more the Court restrains the judgment creditor from executing on his judgment. Thus, a judgment debtor is relieved from the necessity of paying a judgment until a judicial determination by a Court of a claim made by the judgment debtor that he has an unliquidated claim for damages against the judgment creditor. He may draw the protection of the Court around himself and hold off his judgment creditors for an indeterminate period of time.

The circumstances under which a Court of Equity might have granted a stay of execution are not present here. The Rules of Civil Procedure now

govern as to when a Court may stay execution on a judgment.

IN THIS CASE THERE WAS NO PLEADING TO INVOKE THE JURISDICTION OF THE COURT TO GRANT A STAY OF EXECUTION.

The jurisdiction of the Court was not invoked by any pleading requesting this Court for an order to restrain the judgment creditor from executing on her judgment. The judgment debtor offered evidence of the fact that he claims to have a cause of action against the judgment creditor in order to prevent his being held in contempt of Court. There is nothing in the record to show that he offered this evidence in order to secure a stay of execution. The Court should not pass judgment on matters concerning which the jurisdiction of the Court is not invoked.

CONCLUSION

The jurisdiction of the Court was not invoked to secure a stay of execution and even if it were, there were no facts pleaded or provided to entitle a judgment creditor to a stay of execution.

When the grounds upon which a stay of execution may be granted are specifically set forth in the Rules of Civil Procedure, a Court may not grant a stay on other and different grounds. If one of the grounds set forth in the Rules of Civil Procedure is found to be present, the stay of execution can be

granted only upon imposing conditions for the security of the adverse party.

We respectfully submit that the order of the Court restraining the judgment creditor from levying execution should be stricken and the judgment creditor permitted to levy execution on the judgment that was entered December 10, 1954 and that was again entered by the judgment of the lower Court in this preceeding under date of January 14, 1956.

Respectfully submitted,

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